TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

QUESTION PRESENTED 17

STATEMENT OF THE CASE 17

STATEMENT OF FACTS 18

LAW AND ARGUMENT 21

CONCLUSION 25

CERTIFICATE OF SERVICE 25

APPENDIX

TABLE OF CITATIONS

Cases

Alexander v. Louisiana, ... U.S. ..... (1972) 24

Hairston v. Cox, 459 F.2d 1382 (4th Cir. 1972) 1

Norris v. Alabama, 294 U.S. 587 (1935) 20, 22, 23, 24

Swain v. Alabama, 380 U.S. 202 (1965) 24

Other Authorities

28 U.S.C. § 1254(1) 2

Code of Virginia (1936), as amended:

§ 4852 2

Page

§ 4853 3
§ 4856 4
§ 4859 4
§ 4893 4
§ 4895 5
§ 4895a 7
§ 4896 8
§ 4897 8
§ 4900 9
§ 5984 9
§ 5986 10
§ 5987 11
§ 5988 11
§ 5989 12
§ 5990 12
§ 5992 12
§ 5993 14
§ 5994 15
§ 5995 15
§ 5996 16
§ 5999 16
§ 6002 16

In The

Supreme Court of the United States

No. .....

A. E. SLAYTON, JR., SUPERINTENDENT, VIRGINIA STATE PENITENTIARY, (SUCCESSOR TO J. D. COX FORMERLY SUPERINTENDENT),

Petitioner,

v.

KING HAIRSTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

A. E. Slayton, Jr., Superintendent, Virginia State Penitentiary prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on May 18, 1972, in the case of *King Hairston* v. *J. D. Cox, Superintendent, Virginia State Penitentiary.* A petition for rehearing en banc was filed on June 1, 1972, and was denied on June 22, 1972. A subsequent motion for recall and stay of mandate was filed on July 24, 1972 and was denied on July 28, 1972.

OPINIONS BELOW

The memorandum opinion and judgment of the United States District Court for the Western District of Virginia, Danville Division, of April 29, 1970, is not reported, but is included herein as Appendix A (App. pg. 1). The decision of the Court below is reported and may be found at 459 F.2d 1382 (4th Cir. 1972).

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case grounded upon 28 U.S.C., § 1254(1).

STATUTES INVOLVED

The sections quoted below are from the statutory law applicable at the time of respondent's trial in April of 1942 and all of these sections are from the Code of Virginia (1936), as amended.

§ 4852. *When and how grand jurors to be selected by judges of circuit courts of counties and corporation or hustings courts of cities; lists to be delivered to clerk; when and how jurors summoned.*—The judges of the said courts shall annually, in the month of June, July, or August, select from the male citizens of each county of their respective circuits and in their several cities forty-eight persons twenty-one years of age and upwards, of honesty, intelligence, and good demeanor, and suitable in all respects to serve as grand jurors who shall be the grand jurors for the county or city from which they are selected for twelve months next thereafter. Such jurors shall be selected in each county from the several magisterial districts of the county, and in each city from the several wards of the cities in proportion to the population thereof, and the judge making the selection shall at once furnish to the clerk of his court in each county of his

circuit or in his city a list of those selected for that county or city. The clerk, not more than twenty days before the commencement of each term of his court, at which a regular grand jury is required, shall issue a venire facias to the sheriff of his county, or sergeant of his city, commanding him to summon not less than five nor more than seven of the persons selected as aforesaid (the number to be designated by the judge of the court by an order entered of record) to be named in the writ, to appear on the first day of the court to serve as grand jurors. No such person shall be required to appear more than once until all the others have been summoned once, nor more than twice until the others have been twice summoned, and so on; provided, that no male citizen over sixty years of age shall be compelled to serve as a grand juror. The clerk, in issuing the venire facias, shall apportion the grand jurors, as nearly as may be, ratably among the magisterial districts or wards; but the circuit court of James City county, or the judge thereof in vacation, shall select the grand jurors for such court from said county and the city of Williamsburg in such proportion from each as he may think proper. (Virginia Code.)

§ 4853. *Who are qualified; number of grand jurors, regular and special.*—A regular grand jury shall consist of not less than five nor more than seven persons, and a special grand jury of not less than five nor more than seven persons. Each grand juror shall be a citizen of this State, twenty-one years of age, and shall have been a resident of this State two years, and of the county or corporation in which the court is to be held one year, and in other respects qualified juror, and not a constable, or overseer of a road, and, when the grand juror is for a circuit court of a county, not an inhabitant of a city, except in those cases where the circuit

court of the county has jurisdiction in the city, in which case the city shall be considered as a magisterial district, or the equivalent of a magisterial district, of the county for the purpose of the jury lists. (Virginia Code.)

§ 4856. *Foreman of grand jury; his oath, and oath of other jurors, and oaths of witnesses.*—From among the persons summoned who attend, the court shall select a foreman, who shall be sworn as follows: "You shall diligently inquire and true presentment make, of all such matters as may be given you in charge, or come to your knowledge, touching the present service. You shall present no person through prejudice or illwill, nor leave any unpresented through fear or favor, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth. So help you God." The other grand jurors shall afterwards be sworn as follows: "The same oath that your foreman has taken on his part, you and each of you shall observe and keep on your part. So help you God." Any witness testifying before the grand jury may be sworn by the foreman. (Virginia Code.)

§ 4859. *Duties of grand jury.*—The grand jury shall inquire of and present all felonies, misdemeanors, and violations of penal laws, committed within the jurisdiction of the respective courts wherein they are sworn; except that no presentment shall be made of a matter for which there is no corporal punishment, but only a fine, where the fine is limited to an amount not exceeding five dollars. (Virginia Code.)

§ 4893. *Criminal offenses committed in counties and in cities not having corporation courts to be tried in circuit courts; when and by whom venire facias issued in case of felony.*—The circuit courts, except where otherwise pro-

vided, shall have exclusive original jurisdiction for the trial of all presentments, indictments, and informations for offenses committed within the counties, and within the cities which may not have corporation courts, of their respective circuits, and also of all presentments, indictments, and informations pending in the county court on the first day of February, nineteen hundred and four.

The clerk of the court in which the trial of a case of felony is to be had shall, as soon as may be, issue a writ of venire facias, directed to the officer of the said court, requiring him to summon jurors for such trial from a list to be furnished him as provided in section forty-eight hundred and ninety-five. When an indictment is found against a person for felony, the accused, if in custody, or if he appear according to his recognizance, shall, unless good cause be shown for a continuance, be arraigned and tried at the same term. (Virginia Code.)

§ 4895. *Venire facias in case of felony; what to command; number of persons to be summoned and how selected; irregularities; venire, when persons jointly indicted for a felony elect to be tried separately.*—The writ of venire facias in case of felony shall command the officer to whom it is directed to summon twenty persons of his county or corporation, to be taken from a list furnished him by the clerk issuing the writ, who are qualified in all respects to serve as jurors, to attend the court wherein the accused is to be tried on the first day of the next term thereof, or at such other time as the court or judge may direct. At one term of the court only one jury shall be summoned, unless the court or judge thereof otherwise direct; and the jury so summoned may be used for the trial of all the cases which may be tried at that term, including civil cases as well as felonies and misdemeanors.

The list mentioned in this section shall contain the names of twenty-four persons drawn for that purpose by the clerk of the court or his deputy from the names and box provided for by sections fifty-nine hundred and eighty-eight and fifty-nine hundred and ninety of this code. Such drawing shall be in the presence of the judge of the court, or in his absence, of one of the commissioners in chancery provided for by section fifty-nine hundred and ninety-two of this code, and a reputable citizen not connected with the accused or the prosecution, or, in a case of homicide, with the deceased, who shall be called upon for that purpose by the clerk conducting the drawing. If the presence of the commissioner cannot be obtained, the drawing shall be in the presence of two reputable citizens not connected as aforesaid and called upon by the clerk. The clerk shall notify the commissioner of the time his attendance is desired and it shall be his duty to attend at such time at the clerk's office. The drawing, except as herein otherwise provided, shall conform as near as may be to the mode prescribed for drawing juries in civil cases.

For good cause shown in any felony case the judge of the court, in term time or vacation, may direct more than twenty-four names to be drawn and placed on the list, and more than twenty persons to be summoned. He shall in such cases specify the number of names to be drawn and the number of persons to be summoned; the number drawn shall not be more than four in excess of the number to be summoned.

If there is drawn from the box the name of a person who has died, removed from the county or city or is related to the accused or to the prosecutor, or, in case of homicide, to the deceased, or who is known to the clerk or other persons attending the drawing, if the case be in a circuit court of a county, to live within two miles of the place where the

crime is charged to have been committed, such name shall not be placed on the list as they are drawn, and when twenty-four names have been so placed the drawing shall cease, and a copy of said list shall at once be made and signed by the clerk and the persons attending the drawing, which copy shall be filed in the clerk's office. However, nothing in this paragraph shall be construed to relate to the qualifications of jurors, or to confer upon any accused any right to exact compliance with its provisions.

No irregularity in any writ of venire facias or in the drawing, summoning, returning, or impanelling of jurors, or in making out or copying or signing or failing to sign the list or in drawing more persons than four in excess of the number to be summoned, shall be cause for summoning a new panel or for setting aside a verdict or granting a new trial, unless objection thereto specifically pointed out, was made before the jury was sworn, and unless it appears that such irregularity, or error, or failure, was intentional or such as to probably cause injustice to the Commonwealth or to the accused; and no judgment shall be arrested or reversed for the failure of the record to show that there was a venire facias, unless made a ground of exception in the trial court, before the swearing of the jury.

If a person, indicted jointly with others for a felony, elect to be tried separately, the venire summoned for their trial may be used for him who is first tried, and the court shall award a venire facias for the trial of the others, jointly or separately, as they may elect. (Virginia Code.)

§ 4895a. *List showing name, occupation and address of veniremen summoned.*—Every sheriff and city sergeant, after executing a writ of venire facias for a petit jury, shall prepare a list showing the name, occupation and address of

each venireman summoned, and shall deliver said list to the clerk of the court from which said writ is issued, and it shall be the duty of the clerk, upon request, to exhibit said list to the parties or counsel; but no inaccuracy in said list shall constitute error. (Virginia Code.)

§ 4896. *When another venire facias may issue and the panel completed from names selected by the court; fine of juror for non-attendance.*—In any case of felony, where a sufficient number of jurors to constitute a panel of twenty free from exception cannot be had from those summoned and in attendance, or when the venire facias, or panel has been quashed for any cause, the court shall select from the names on the list provided for by sections fifty-nine hundred eighty-eight and fifty-nine hundred and ninety, the names of, and cause to be summoned, so many persons as may be deemed necessary to obtain a panel of twenty free from exception; and, if for any reason, the said list be found to have been unlawfully, illegally, or improperly prepared, the court shall select from the persons who were eligible to have been placed on said list and cause to be summoned, so many persons as may be deemed necessary to obtain a panel of twenty, free from exception, and the venire thus summoned, in either such event may be used for the trial of all criminal cases to be tried at that term, both felonies and misdemeanors, in the same manner as if the venire had been obtained according to the provisions of section four thousand eight hundred and ninety-five.

If any person summoned under any venire facias authorized by this chapter fail to attend, as required, without sufficient excuse, he shall be fined by the court not less than five nor more than twenty dollars. (Virginia Code.)

§ 4897. *Court or judge may cause venire facias to issue at any time for trial of felony.*—Any court in which a per-

son accused of felony is to be tried, or the judge of such court in vacation may at any time cause a venire facias to issue for his trial. (Virginia Code.)

§ 4900. *How panel selected and jury constituted; how trial had upon plea of guilty without a jury.*—In every case of a felony, there shall be selected from the persons summoned, as aforesaid, a panel of twenty persons, free from exception, from which panel the Commonwealth may strike four and the accused four, and the remaining twelve shall constitute the jury for the trial of the accused. The striking off of jurors shall be done alternately, the Commonwealth beginning. If either the accused or the attorney for the Commonwealth fail to strike off any, or if they strike off a less number than above allowed, twelve of the panel, or of those remaining thereon, shall be selected by lot who shall constitute the jury, provided, however, that upon a plea of guilty, tendered in person by the accused, and with the consent of the attorney for the Commonwealth, entered of record, the court shall hear and determine the case without the intervention of a jury. In such cases the court shall have and exercise all the powers, privileges, and duties given to juries by sections forty-seven hundred and sixty-seven, forty-seven hundred and eighty-three, forty-nine hundred and eighteen, forty-nine hundred and twenty, forty-nine hundred and twenty-one, and forty-nine hundred and twenty-two, or any other statute relating to crimes and punishments. (Virginia Code.)

§ 5984. *Who liable to serve as jurors.*—All male citizens over twenty-one years of age who shall have been residents of this State one year and of the county, city or town in which they reside six months next preceding their being summoned to serve as such, and competent in other respects, except as hereinafter provided, shall remain and be liable

to serve as jurors; but no officer, soldier, seaman, or marine of the United States army or navy shall be considered a resident of this State by reason of being stationed herein, nor shall an inmate of any charitable institution be qualified to serve as juror. The following persons shall be disqualified from serving as jurors: First, idiots and lunatics; second, persons convicted of bribery, perjury, embezzlement of public funds, treason, felony, or petit larency. (Virginia Code.)

§ 5986. *Appointment of jury commissioners.*—The judge of the circuit court of each county and city, and the judge of every city court where juries are empaneled, shall, prior to the fifteenth day of February in each year, or as soon thereafter as practicable, appoint for the next ensuing year ending on the following fifteenth day of February not less than two nor more than five persons as jury commissioners, who shall be competent to serve as jurors under the provisions of this chapter, and shall be citizens of intelligence, morality, and integrity. No practicing attorney at law, however, shall hereafter be appointed as a jury commissioner. Such appointment shall be certified by the judge to the clerk of the court for which the appointment is made, who shall enter the same on the common law order book of such court. Every jury commissioner shall have a fee of five dollars a day for the time actually engaged in making out the list of jurors mentioned in section fifty-nine hundred and eighty-eight, to be paid out of the treasury of the city or county for which he is appointed on the certificate of the judge making the appointment, or in case of his death, removal, or inability to act, on a certificate of his successor in office or of the judge designated to hold his courts. No jury commissioner shall be eligible to reappointment for at least two years after the expiration of the year for which

he was appointed. For the purpose of this section, the two parts of the hustings court of the city of Richmond shall be deemed to be separate courts. (Virginia Code.)

§ 5987. *Notification of jury commissioners; their oath.*—Such commissioners shall be immediately notified of their appointment by the clerk, and before entering upon a discharge of their duties shall take and subscribe an oath or affirmation before the clerk of said court in the following form: "I do solemnly swear (or affirm) that I will honestly, without favor or prejudice, perform the duties of jury commissioner during the year .....; that in selecting persons to be drawn as jurors, I will select none but persons whom I believe to be of good repute for intelligence and honesty; that I will select none whom I have been requested to select, and that in all my selections I will endeavor to promote only the impartial administration of justice." (Virginia Code.)

§ 5988. *List of jurors to be prepared by the jury commissioners.*—Such commissioner, shall, as soon as may be after their appointment, prepare a list of such of the inhabitants of that county or city as are well qualified to serve as jurors and are not excluded or exempt by sections fifty-nine hundred and eighty-four and fifty-nine hundred and eighty-five of this Code. The whole number of persons selected in the county or city shall not be less than one hundred nor more than three hundred, except that for the city of Richmond and the city of Norfolk the number shall not exceed one thousand and the corporation court for the city of Roanoke, the number shall not exceed six hundred, and for the city of Newport News and the city of Petersburg the number shall not exceed five hundred. The same percentage of population shall be taken from each magis-

terial district or ward. The inhabitants of a city, however, which is situated in whole or in part within the bounds of a county shall not be placed on the lists for such county; except in those cases where the circuit court of the county has jurisdiction in the city in which cases the city shall be considered as a magisterial district, or the equivalent of a magisterial district, of the county for the purposes of the jury lists. (Virginia Code.)

§ 5989. *Lists to be delivered to clerks, and by them safely kept.*—The list so prepared shall be delivered to the clerk of the court, to be safely kept by him. To such list the commissioners may from time to time, add the names of any persons liable to serve, and strike therefrom the names of any who have become disqualified or exempt from such service, but the number on the list shall not at any time exceed the number prescribed by the preceding section. (Virginia Code.)

§ 5990. *Names of jurors to be written on separate ballots; ballots to be folded and deposited with list in a box.*—When such list is made out, the commissioners shall cause all the names thereon to be fairly written, each on a separate paper or ballot, and shall so fold or roll up the ballots that they will resemble each other as nearly as may be, and the names written thereon not be visible on the outside, and shall deposit the ballots with the said list in a secure box prepared for that purpose, and the said box shall be locked and safely kept by the clerk of such court and opened only by the direction of the judge thereof, as hereinafter provided. (Virginia Code.)

§ 5992. *When and how ballots drawn, and what number; when venire facias issued and persons drawn summoned; return by officer; when ballot drawn to be destroyed and*

another juror drawn.—The clerk of each circuit, corporation, and city court shall, at least ten days before any term of such court at which a jury may be necessary, to be designated by the judge of such court, proceed to draw the jury by lot from the ballots deposited in the said box in the following manner, in the presence of the judge of such court, if present; if not, then in the presence of a commissioner in chancery of his own court, if there be one, and if none, of some other court of his city, which commissioner shall have been previously designated by the court in which the jury is to sit, upon an order entered of record; provided, however, no such commissioner shall be eligible to witness the drawing of a jury to be used in the trial of any case in which he shall be interested as attorney or otherwise. In the event of the absence, for good cause, of a commissioner in chancery duly qualified to serve, the clerk shall call upon one or two citizens, as the case may be, to witness the drawing of the ballots from the jury box. The clerk of each court shall give reasonable notice, in writing, to the said commissioner in chancery of the time and place of drawing the jury, and shall openly draw from said jury box in the clerk's office. After shaking and mixing together the ballots in said box, nine ballots (without inspecting the names written on any until the proper number is drawn) shall be drawn and listed by the clerk, and he shall forthwith issue and deliver a writ of venire facias to the proper officer of the county or city requiring him to summon the persons thus drawn, whose names shall be stated in the writ, together with the day of the term and the court at which their attendance is required; and it shall be the duty of the officer, at least three days before the time of such attendance, to summon each person who is drawn to attend the court at the time and place mentioned in the writ, and to make due return

thereof at the opening of such court. If any person whose name is so drawn is known to be unable by reason of sickness, absence from home or other cause to attend as a juror, his name shall be returned to the box, or if he is exempt by law or his name has been stricken from the jury list, the ballot shall be destroyed, and another juror shall be drawn in his stead.

In the event it shall become necessary to have a jury for the trial of civil cases at any term of a court for which no such jury has been drawn and summoned as above provided for, and there be not then present any other regularly summoned jurors from whom such a jury may be selected, the court may, by an order entered of record, require a jury to be drawn and summoned in the manner above directed. Such order shall specify the number of jurors to be drawn and summoned, and the day upon which they are required to attend, and shall direct a writ of venire facias for said jurors to be issued and executed in the manner hereinabove specified; provided, however the court may, in its discretion, direct more than nine such jurors to be drawn and summoned, and shall require said venire facias to be executed forthwith. The jurors so provided shall constitute a jury for the trial of civil and misdeameanor cases at such term with like force and effect as if they had been drawn and summoned as first herein directed. (Virginia Code.)

§ 5993. *When and how court or judge may order greater number of jurors; duty of clerk in such case; issue of venire facias.*—Whenever, in the opinion of any such court, or the judge thereof in vacation, a greater number of jurors than nine is necessary for the dispatch of the business of such court, such opinion shall be entered of record together with the number of jurors deemed necessary, and upon such order it shall be the duty of the clerk of said court to notify the

Commonwealth's attorney and the said commissioner in chancery, as provided by law, and draw from the jury box of his court the number of names designated by the court or judge, as the case may be, and the clerk of said court shall issue a venire facias accordingly. (Virginia Code.)

§ 5994. *What endorsed on ballot, when drawn; what entered on list.*—When any person is drawn and returned to serve as a juror as aforesaid, the judge, if present, if not, the Commonwealth's attorney or commissioner in chancery, shall cause to be endorsed on the ballot containing his name, the word "drawn," and shall return it to the box; and the date of the draft shall be entered on the list of jurors opposite his name. (Virginia Code.)

§ 5995. *No person competent to serve as juror at more than one term during the same year; in cities of fifty thousand population no person compelled to attend more than two weeks in any one year.*—No person who has been sworn for the purpose, and who has actually sat as a juror in the trial of any case, either civil or criminal, at any one term of a court, shall be permitted to serve as a petit juror, or a juror in any criminal case, at any other term of that court during the one year period for which the persons composing the jury list on which his name was placed, were selected to serve as prescribed by law, except on a special jury, unless all the persons whose names are in the jury box have been drawn to serve during such one year period, but no exception to any such juror on this ground shall be allowed after he is sworn. If, however, exception be duly made, and such person is permitted to serve in contravention of this section, it shall of itself constitute reversible error. In cities having a population of fifty thousand or more, no person shall be compelled to attend as a grand or petit juror, or both, for more than two weeks in any such one

year period, unless at the time of the expiration of the two weeks the juror be actually engaged in the trial of a case, but at the end of such case the juror, shall, upon request, be discharged. (Virginia Code.)

§ 5996. *How juries selected from the jurors.*—On the day when the jurors are summoned to attend at any court, the clerk shall write the name of each one who shall be in attendance and not excused, on a separate paper or ballot, and place the same in a box to be kept for that purpose; and juries for the trial of cases shall be selected therefrom by lot. (Virginia Code.)

§ 5999. *When not enough jurors, how deficiency supplied.*—When by reason of challenge or otherwise, a sufficient number of jurors summoned cannot be obtained for the trial of any case, the court shall select from the names on the list provided for by sections fifty-nine hundred and eighty-eight and fifty-nine hundred and ninety, the names of, and cause to be summoned, so many persons as may be deemed necessary. Writs of venire facias issued under this section shall be executed and returned as the court shall direct. (Virginia Code.)

§ 6002. *Irregularity cured by verdict.*—No irregularity in any writ of venire facias or in the drawing, summoning, returning or empaneling of jurors shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity or unless the objection specifically pointing out such irregularities was made before the swearing of the jury; and no judgment shall be arrested or reversed for the failure of the record to show that there was a venire facias unless made a ground of exception in the trial court before the jury is sworn. (Virginia Code.)

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That The Respondent Had Established A Prima Facie Case That Blacks Had Been Systematically Excluded From The Grand Jury Which Indicted Him And The Petit Jury Which Tried And Convicted Him In The Face Of The Evidence Adduced At The State Court Plenary Hearing And The Findings Of The Chief District Judge For The Western District Of Virginia?

STATEMENT OF THE CASE

King Hairston, hereinafter referred to as respondent, is presently detained pursuant to a judgment of the Circuit Court of Henry County of April 8, 1942, wherein respondent was sentenced to serve a term of life imprisonment on a conviction of murder in the first degree. No direct appeal was filed from this judgment, but a petition for a writ of habeas corpus, dated January 4, 1968, was filed in the Circuit Court of Henry County. On January 23, 1968, a show cause order was issued directed to the petitioner and, on February 16, 1968, an answer was executed on behalf of the petitioner requesting that a plenary hearing be held in that Court. Counsel was appointed to represent respondent for the plenary hearing held on September 23, 1968, and the petition for a writ of habeas corpus was denied and dismissed by order of the Circuit Court of Henry County on October 1, 1968. On April 29, 1969, the Supreme Court of Virginia denied and refused a writ of error to the judgment of the Circuit Court of Henry County.

On September 29, 1969, a petition for a writ of habeas corpus was filed by respondent in the United States District Court for the Eastern District of Virginia, at Richmond, and the action was transferred to the Western District. Chief Judge Dalton of the latter Court directed that coun-

sel for the petitioner answer the petition within thirty (30) days after the order. Subsequent to the timely answer filed on behalf of petitioner, the respondent herein filed an additional petition alleging the same matters contained in the earlier one. On April 29, 1970, the judgment of the District Court was entered denying and dismissing the Federal petition for a writ of habeas corpus. A subsequent appeal to the United States Court of Appeals for the Fourth Circuit was taken by the respondent and on May 18, 1972, the judgment complained of was entered by the Court below and a petition for rehearing en banc was denied on June 22, 1972.

STATEMENT OF FACTS

The respondent, a Negro, seeks his release on the grounds of discrimination in connection with the selection of the grand and petit juries in Henry County, Virginia, of 1942. There is no transcript extant of the trial in the Circuit Court of Henry County on April 8, 1942, but the plenary hearing of September 23, 1968, was transcribed and it was upon the evidence taken at that hearing that the Courts below based their holdings. That evidence can be summarized briefly as follows with references to the appendix filed by respondent in the Court of Appeals:

John H. Mathews, the Clerk of the Henry County Circuit Court, was serving as a Deputy Clerk at the time of respondent's trial in 1942 (App. 15). He testified that the 1940 census showed a total population of something over 26,000 in Martinsville-Henry and that approximately 20% of that population was Black (App. 20, 23). He had no idea as to what percentage of the male population over 21 was Black, however (App. 26). His recollection was that the jury commissioners and the grand jurors for

respondent's term of court were all white (App. 17, 19). The jury commissioners were to pick a list of 300 names to go into the jury box for the year and they were to pick persons "that they knew to be good people" and they could use the voting list, tax paid list or telephone directory to determine these names (App. 19-21, 26). Mathews believed that the 20 jurors called for petitioner's case were all white with the possible exception of one juror, "Josh" or "James L." Richardson (App. 18-19), but he had no positive recollection as to whether Richardson was Black or White (App. 23). He further had no specific recollection of the respondent's case or whether any Negro was called for jury service during 1942 (App. 24). He did remember the trial of one Virgil Lawrence in 1944 and that two of jurors at that trial were Black (App. 24-25). After the passage of 26 years, the jury list and most of the other records of the trial had been lost or destroyed (App. 23, 25).

King Hairston, the petitioner, testified on this point that there were no Negroes "at all that I could tell, they was all of white complexion so far as I know" (App. 32). He further stated that he had waited 26 years to attack his conviction because he "had several different things on my mind . . ." (App. 39A), and he had made a number of efforts to secure his release through a gubernatorial pardon (App. 39A-39C).

O. B. Wells, a Henry County Deputy Sheriff, was serving in the same capacity in 1942 (App. 32). He first specifically recalls Blacks serving on juries in 1943 or 1944, but his "earliest recollection" is of 1944 (App. 32-33). He does remember the trial of Virgil Lawrence in 1944 and two of the jurors at that trial, Musco Jamerson and Charlie Redd, were Black (App. 33).

W. R. Broaddus, Jr., was the Commonwealth's Attorney for Martinsville-Henry in 1942 and he had a vague recollection of petitioner's case, though not of the facts of the case (App. 33-34). He remembered that after the first of the "Scottsboro" cases and after the case of *Norris* v. *Alabama,* 294 U.S. 587 (1935), decided in April of 1935, Judge Clements directed "that there should be qualified Negro names placed in the jury box and they were used after that time in Henry County" (App. 34). The Judge "ordered that they be used" and "he didn't say in what proportion" (App. 34-35). He certainly did not indicate that a token number only be used (App. 35).

Hannibal Joyce, opened an office for the practice of law in Martinsville in 1935 and he assisted in the defense of the respondent with the late Kennon C. Whittle, who subsequently served as a Judge of the Circuit Court and as a justice of the Supreme Court of Virginia (App. 36). Judge Clements "always followed the practice of having members of the Negro race for jury duty" and "it was customary for members of the Negro race to be summonsed just like everybody else . . ." (App. 36-37). Although the Black jurors were never in any large numbers because not as high a percentage were registered to vote, Judge Clements insisted that "the jury commissioners select jurors without regard to race" (App. 37-38). He could specifically recall one or two men who served regularly but he could remember "some others by face" and Blacks "always were here at every term as far back as [he] can remember" (App. 37).

Exhibits filed by the petitioner with his answer showed that during the respondent's detention he was sent to Central State Hospital in July, 1956, for a period of three and one half months, again in July, 1957, for about two months, in March, 1961, for about two years and again on

December 20, 1968, and he was still there in October of 1969, when the aforesaid answer was filed, although he had apparently been released from Central State Hospital prior to filing his amended Federal petition in January of 1970 (App. 4-7). The respondent appeared to be mentally ill and suffering from paranoid delusions (App. 5).

LAW AND ARGUMENT

Did The United States Court Of Appeals For The Fourth Circuit Err?

There is an essential problem in this case which is directly related to respondent's own delay in presenting the question raised here to either the State or Federal courts. The respondent first raised the question of jury discrimination in a petition for a writ of habeas corpus filed in the Circuit Court of Henry County just three months short of 26 years after his conviction. This delay in and of itself has created an immense vacuum in the factual context in which this case might be decided. As Judge Albert V. Bryan in his dissent from the decision of the panel of the United States Court of Appeals for the Fourth Circuit pointed out:

> "For 26 years appellant has withheld any challenge to the methods by which the juries were chosen that indicted and convicted him of murder in 1942. Nothing is adduced to show why the contention he now makes could not have been asserted then. However, it is conclusively established that this inexplicable delay obstructs, if not defeats, the ability of the state to rebut his charges. Time, through death, disappearance of witnesses and destruction of records, serves one who would fault the proceedings in which he has been convicted." (459 F.2d at 1386-1387)

The evidence presented at the State plenary hearing reveals that due to the passage of time the indictment and warrant had been lost (App. 16), the master jury list for 1942 was not found (App. 22) and the jury commissioners in 1942, the Judge who tried the case, the Clerk of the Circuit Court at the time, the Sheriff and the chief counsel for the defense at respondent's original trial were all deceased. Thus, the petitioner's ability to successfully defend against respondent's belated claim of systematic exclusion is significantly and substantially blended by the passage of time occasion by respondent's own delay in attempting to vindicate his legal rights.

The essential question presented by this petition is whether the decision of the two judges of the Court below comprising the majority of the panel which decided this case is to be deemed conclusive when contrasted with the decision of the dissenting judge below, the District Court judge, the State Court judge, and the Supreme Court of Virginia. The majority opinion of the Court below relies quite heavily on the non-recollection of the witnesses testifying at a plenary hearing held some 26 years after the respondent's trial and in that opinion the majority members of the panel state that "their non-recollection is of great weight since the presence of Negroes on juries in the late thirties or early forties would certainly have been an event of note, given the then condition of race relations" (459 F.2d at 1384-1385). It is respectfully submitted that this is a dangerous and unreasonable generalization to draw from the evidence presented in this case.

Quite to the contrary of the generalization relied on by the majority of the Court below, the testimony developed at the plenary hearing in the State court demonstrated that after the case of *Norris* v. *Alabama*, 294 U.S. 587 (1935),

the Judge of the Circuit Court of Henry County directed "that there should be qualified Negro names placed in the jury box and they were used after that time in Henry County" (App. 34). The former Commonwealth's Attorney further testified that the Judge "ordered that they be used" and he didn't say in what proportion, but he did not indicate that a token number only would be used (App. 34-35). One of the attorneys who had participated in the respondent's defense had practiced law in Martinsville and Henry County since 1935 and he testified that the trial judge at the time of the respondent's trial "always followed the practice of having members of the Negro race for jury duty" and "it was customary for members of the Negro race to be summonsed just like everybody else . . ." (App. 36-37). Although the Black jurors were never in any large numbers because not as high a percentage were registered to vote, Judge Clements of the Circuit Court had insisted that "the jury commissioners select jurors without regard to race" (App. 37-38). He further testified that Blacks "always were here at every term of Court as far back as [he] can remember" (App. 37). This evidence certainly does not support the assertions of the majority and the Court below that "no one recalled seeing a Negro actually serve until 1944" and "there is little difference between the testimony in *Norris* and that of the witnesses here who could not recall that a black ever *served* on either jury, except for one case in 1944" (459 F.2d at 1384-1385). The majority opinion went on to state that "even in the light most favorable to the State, the present evidence shows that Negroes had been underrepresented—if not unrepresented—on grand and petit juries for years" (459 F.2d at 1386). It is respectfully submitted that this assertion is not supported by the evidence before the Court. Judge Bryan in his dissent quite rightly pointed out that:

> "Rather than reveal discrimination in the drawing of Negroes as jurors, the evidence indicates that inclusion of them was essayed. Witnesses without contradiction testified that the Judge of the State Court in which Hairston was tried had explicitly directed as early as 1935 that Negroes be put on jury rolls, obeying the precept of *Norris* v. *Alabama,* 294 U.S. 587 (1935). The mere circumstance that none served on the jury which indicted and convicted petitioner—a fact subject to a witness' suggestion that one of the petit jurors may have been a Negro—does not support the claim of systematic exclusion entitling petitioner to relief." (459 F.2d at 1387)

Judge Bryan's dissenting opinion was quite correct in pointing to the fact that there was affirmative and positive evidence of non-discrimination as opposed to the respondent's mere assertion that Blacks were systematically excluded from the juries. As your Honors have pointed out in *Swain* v. *Alabama,* 380 U.S. 202 (1965), purposeful discrimination may not be assumed or proved by the mere assertion thereof and the initial burden of proof is on the person seeking relief.

The reliance of the majority in the Court below on your Honors' recent decision in *Alexander* v. *Louisiana,* .... U.S. ..... (1972) was misplaced. In that case pretrial motions were made by the petitioner there to quash his indictment on the grounds of exclusion of both Negroes and women from the grand jury which had indicted him. There, there was precise statistical data regarding the census figures, the questionnaires which had been sent out, the racial proportions on the jury lists, the jury venire and the grand jury in question. In addition, the questionnaires and other documents included racial designations. Thus, a prima facie case of discrimination had been established. The respondent here had not only failed to establish that there was the systematic exclusion

of Blacks from his juries at his trial in 1942, but he also failed to establish sufficient facts upon which to rest even a prima facie showing of discrimination. Thus, his belated attack on the 1942 conviction must fail and a petition for a writ of certiorari should be granted and the judgment below reversed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
Assistant Attorney General of Virginia

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of September, 1972, I mailed a copy of the foregoing petition for a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Daniel H. Pollitt, Esquire, University of North Carolina School of Law, Chapel Hill, North Carolina 27514, counsel for respondent herein.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, DANVILLE DIVISION

* * *

King Hairston, a state prisoner, has filed two petitions for a writ of habeas corpus seeking relief pursuant to 28 U.S.C. § 2241. The first (Civil Action No. 69-C-55-D) was filed with this court on September 30, 1969; the second (Civil Action No. 70-C-6-D) was filed on February 3, 1970. For purposes of expediency and efficiency, the two petitions are consolidated and judgment will herein be rendered on both.

By his petitions, Hairston attacks a conviction in the Circuit Court of Henry County on April 8, 1942, for first degree murder. Petitioner, represented by court-appointed counsel, entered a plea of not guilty and was tried by a jury. A sentence of life imprisonment was imposed upon this conviction.

While no appeal was taken from the conviction, petitioner has exhausted the available state habeas corpus remedies on the claims he presents to this court. A petition for a writ of habeas corpus was filed on November 13, 1967, with the Circuit Court of Henry County. After appointing counsel to represent petitioner, a plenary hearing was held. Thereupon, that court dismissed the petition. On April 29, 1969, the Virginia Supreme Court of Appeals affirmed the Circuit Court's dismissal of the petition. Petitioner has exhausted his available state remedies in compliance with 28 U.S.C. § 2254.

While the petitions are unclear, petitioner appears to seek relief on the following grounds: (1) Systematic exclusion of Negroes from the grand and petit jury; (2) a warrantless arrest; (3) an improper preliminary hearing; (4) no indictment in the present record; (5) an improper

jury verdict; and (6) ineffective representation of counsel.

Petitioner has alleged that both the grand and petit juries in his case were all white. The facts surrounding this claim appear as follows:

In 1942 the Henry County population was approximately 20 to 30% Negro. The testimony at the plenary hearing shows that there were no Negroes on the grand jury which indicted petitioner. There was possibly one Negro on the twenty man jury panel for petitioner's trial. The three Henry County jury commissioners in 1942 were all white.

The jury commissioners selected prospective jurors from capitation lists, from the telephone book, and from their own personal knowledge. After 1935 Judge Clements directed the jury commissioners to include Negroes on the grand and petit juries.

The evidence does not disclose what percentage of Negroes were available and qualified to serve on these juries as compared with the qualified white population. The record is even devoid of any figures disclosing the percentage of Negroes on the jury panel list of 1942.

Although the evidence discloses that Negroes were underrepresented on petitioner's grand and petit juries, these are not controlling factors. A defendant is not constitutionally entitled to a proportionate number of members of his race on the petit or grand juries which try or indict him. *State of Virginia* v. *Rives,* 100 U.S. 313, 25 L.Ed. 667 (1879).

In order to obtain relief, petitioner must demonstrate purposeful discrimination based on race. Purposeful discrimination may not be assumed or proved by the mere assertion. *Swain* v. *State of Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). The burden of proof initially is on the petitioner. *Swain* v. *State of Alabama,* supra; *Tarrance* v. *State of Fla.,* 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903).

Petitioner can make out a prima facie case of jury discrimination by proving a *substantial* disparity between the percentage of Negro residents in the county as a whole and the percentage of Negroes on the jury list. *Turner* v. *Fouche*, 24 L.Ed.2d 567 (1970). See also, *Coleman* v. *Alabama*, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed.2d 22 (1967); *Norris* v. *State of Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935). Merely showing that the jury panel was selected from a segregated list, without more, does not make out a prima facie case of discrimination. Nor is a prima facie case made by showing a mere unequal proportion of Negroes in the community to those on the jury panel. Petitioners must demonstrate that this disparity was the result of a purposeful or studied attempt to include or exclude a specified number of Negroes. *Swain* v. *State of Alabama*, supra. Underrepresentation by as much as 10% was held in *Swain* not to make out a prima facie case of discrimination. A prima facie case can, however, be made out by showing both that the jury panel was drawn from a segregated list *and* that there was an unequal proportion of the petitioner's race on the jury panel for the year he was tried. *Jones* v. *Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967); *Sims* v. *Georgia*, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967); *Whitus* v. *State of Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). Finally, a prima facie case cannot be made out by showing that there are not now or never have been any Negroes on the jury commission. *Carter* v. *Jury Commission of Green County*, 24 L.Ed.2d 549 (1970).

As to what other matters make out a prima facie case, I am not prepared to say. It is sufficient to note that petitioner has not made out a prima facie case under any of the above standards. Nor are any other matters presented in the record which make out a prima facie case of discrimination.

Petitioner has failed to provide any figures on the percentages of Negroes on the Henry County jury lists of 1942. Because of the long delay in making this claim, petitioner has restricted his means of proof. The jury list has been destroyed and all of the important witnesses are dead —including the judge of the Court, the Clerk of the Court, and the jury commissioners. While I do not impose the strict forfeiture procedure set out in *Wade* v. *Peyton*, 378 F.2d 50 (4th Cir. 1967), it is clear that petitioner is the source of his own difficulties. The facts are not sufficient to show any discrimination in the selection of Negroes for the Henry County jury panels of 1942. Rather than showing discrimination, the facts demonstrate the fairness of the jury selection. Judge Clements was careful that Negroes were called for jury duty in his court. In the absence of evidence to the contrary, I must assume that there was no systematic exclusion of Negroes from the grand and petit juries.

Petitioner also complains that he was arrested without a warrant. The plenary state court, after a full and adequate hearing, determined that there was a warrant in this case. The evidence very strongly supports this conclusion and for that reason I accept the state court's determination. Furthermore, an unlawful arrest, in itself, presents no constitutional issue unless something occurred as a result thereof to deny the petitioner a fair trial. *Delano* v. *Crouse*, 327 F.2d 693 (10th Cir. 1964); *Howard* v. *Allgood*, 272 F.Supp. 381 (E.D.La. 1967); *United States ex. rel. Williams* v. *Myers*, 196 F.Supp. 280 (E.D. Pa. 1961).

Petitioner alleges that he was given a preliminary hearing in the city court and sent to the county grand jury. The matter of a preliminary hearing is merely procedural under Virginia law. *Snyder* v. *Commonwealth*, 202 Va. 1009 (1961). I am not convinced that even the failure to give a preliminary hearing would raise a federal constitutional is-

sue. Cf. *Vess* v. *Peyton*, 352 F.2d 325 (4th Cir. 1965). In 1942, the Circuit Court of Henry County was the only Court of Record for the City of Martinsville and Henry County. Therefore, every defendant who was given a preliminary hearing in the Trial Justice Court of the City would be sent to the Circuit Court of Henry County for trial. While the testimony indicates that petitioner was given the preliminary hearing in the County Court, I can see no constitutional issue if the facts were as petitioner alleged.

The petitioner alleges that there was no indictment in his case. After the plenary hearing, the state court held, ". . . unquestionably there was an indictment and I don't think that there can be a serious contention otherwise." The evidence amply supports this conclusion and this court relies thereon in rejecting this claim.

Petitioner next contends that the jury verdict was improper in that the jury did not say what they found him guilty of. In rejecting this claim, the state court indicated that at times the form of the jury verdict is not correct and must be changed. The court found that if an amendment was made, it was only to form and did not affect the penalty. This court is satisfied with that factual determination.

The remainder of petitioner's allegations relate to ineffective representation of counsel. Petitioner claims that (1) the order of the trial court does not show that he had a lawyer at the trial; (2) that counsel failed to put four witnesses on the stand; and (3) that he asked his lawyer to appeal and the lawyer denied the request.

Petitioner's first contention is frivolous. Not even the petitioner himself denies that he did in fact have counsel. Although one of the petitioner's counsel is dead, the other counsel did testify at the plenary hearing.

Whether to put certain witnesses on a stand are matters relating to trial tactics. Mistakes in trial tactics do not amount to ineffective representation of counsel unless they make a farce of the trial. *Tompa* v. *Commonwealth of Virginia*, 331 F.2d 552 (4th Cir. 1964); *Snead* v. *Smyth*, 273 F.2d 838 (4th Cir. 1959). Petitioner stated that four witnesses were summoned but they were never put on the stand. One of the petitioner's counsel testified that they always followed up a lead on a witness to see if he could help the case. The fact that counsel summoned the witnesses petitioner speaks of demonstrates that they were cognizant of what the witnesses had to offer. Petitioner has not demonstrated that the failure to call these witnesses made a farce of his trial. The evidence points to the fact that petitioner had extremely competent counsel. One of petitioner's counsel was Kennon C. Whittle, who is now deceased. Mr. Whittle later became a Justice of the Virginia Supreme Court of Appeals. Petitioner's other counsel was one of Mr. Whittle's law partners. Both men had considerable experience in the criminal law field.

Petitioner's final contention is that counsel, on request, refused to appeal petitioner's conviction. Petitioner testified that he requested Mr. Whittle to appeal his case and was refused because of the lack of funds. Petitioner's living counsel testified that there was never any question concerning money. The plenary court did not believe there was anything to this claim. Obviously it did not believe petitioner was denied an appeal for the reason of money and neither does this court.

The court must consider the implications of *Nelson* v. *Peyton*, 415 F.2d 1154 (4th Cir. 1969), which held that the failure to inform a client of his right to appeal amounts to ineffective representation of counsel. While I have considerable doubt on the soundness of applying *Nelson* retro-

actively, I am not compelled to herein determine that issue. The state court obviously relied on the testimony of petitioner's counsel in this matter. He testified:

> A. I remember this, that we talked with King Hairston after the verdict was in. I do remember that.
>
> Q. Did you talk to him about an appeal?
>
> A. We talked about the trial. Not only that case but whenever a case of that kind was over we always [talked with] the client immediately after the verdict was in. If we had any motion to make we made it, but we always made it a point . . . immediately after trial to take him, usually right in the room over there called the attorney's office with a sign on the door, and talk to the defendant about what had happened and I am sure that we talked to King Hairston on that day. I'm sure that we told him that there had been no error in the trial, we'd gotten all the instructions we asked for, the witnesses were here, and that he'd have to make up his mind to go on down to the penitentiary and serve his time. And if he behaved himself he'd probably stand—be in good shape to get out on parole. I'm quite sure, we invariably said "we don't have anything to note an appeal on, there was no error in this trial" if there wasn't. If there was, we immediately started talking about an appeal, if the Court had made an error, to our client then, not some later date.

Counsel did talk with petitioner concerning any rights to appeal he may have had. Counsel did provide their best advice concerning an appeal and I see no error even under the strict requirements of *Nelson*.

For the foregoing reason, it is Adjudged and Ordered that the petition for a writ of habeas corpus be dismissed and the relief denied.

If the petitioner wishes to appeal this judgment or any part thereof, he may do so by filing with the clerk of *this* court a notice of appeal. Failure to file the notice of appeal within 30 days may result in a denial of the right to appeal. The notice shall state the following:

1. The party or parties taking the appeal;
2. The judgment, order or part thereof appealed from: and
3. The court (United States Court of Appeals for the Fourth Circuit) to which the appeal is taken.

The clerk is directed to certify copies of this opinion and judgment to the petitioner and to the respondent.

Enter:

/s/ Ted Dalton
U.S. Chief District Judge
April 29, 1970

If the petitioner wishes to appeal this judgment or any part thereof, he may do so by filing with the clerk of *this* court a notice of appeal. Failure to file the notice of appeal within 30 days may result in a denial of the right to appeal. The notice shall state the following:

1. The party or parties taking the appeal;
2. The judgment, order or part thereof appealed from: and
3. The court (United States Court of Appeals for the Fourth Circuit) to which the appeal is taken.

The clerk is directed to certify copies of this opinion and judgment to the petitioner and to the respondent.

Enter:

/s/ Ted Dalton
U.S. Chief District Judge
April 29, 1970

FILED
SEP 20 1972
MICHAEL RODAK, JR., CLERK

ADDENDUM TO APPENDIX

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 14,768 72-470

King Hairston,

Appellant,

versus

J. D. Cox, Superintendent,
Virginia State Penitentiary,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Danville.
Ted Dalton, Chief Judge.

(Argued March 5, 1972 Decided May 18, 1972.)

Before Bryan, Winter and Craven, Circuit Judges.

Professor Daniel H. Pollitt (Court-appointed counsel) for Appellant, and Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, on brief) for Appellee.

Winter, Circuit Judge:

In this appeal by a Negro state prisoner who sought a federal writ of habeas corpus on the ground of systematic exclusion of Negroes from the grand jury which indicted him and the petit jury which tried and convicted him, we think that petitioner established a prima facie case. Accordingly, we reverse the order denying the writ and remand the case for an evidentiary hearing to afford the State the opportunity to offer rebuttal evidence. If the prima facie case is not successfully overcome, the writ should issue.

—I—

Petitioner, King Hairston, was convicted of first degree murder in the Henry County, Virginia, Circuit Court on April 8, 1942. He was sentenced to life imprisonment. He did not appeal, but he sought habeas corpus relief in that court in November, 1967. After a hearing held in September, 1968, the petition was dismissed; and its dismissal was upheld by the Virginia Supreme Court of Appeals in April, 1969. He then filed a habeas corpus petition in the district court in September, 1969, and another in February, 1970. These were considered together and, as interpreted by the district court (with which we agree), they raised these issues: "(1) Systematic exclusion of Negroes from the grand and petit jury; (2) a warrantless arrest; (3) an improper preliminary hearing; (4) no indictment in the present record; (5) an improper jury verdict; and ineffective representation of counsel."

The district court dismissed the petitions on the basis of the evidence adduced at the state court hearing and the state court's findings of fact. With respect to the issue of systematic exclusion, the district court found that petitioner had not proved a prima facie case, thus making an evi-

dentiary presentation by the state unnecessary. Since we agree with the disposition of all issues save systematic exclusion, we will confine our discussion to it.

—II—

By the 1936 Virginia code provisions, which governed criminal jury selection in 1942, forty-eight grand jurors were selected by the circuit court judge to serve twelve months. From these, the clerk would choose five to seven persons for service during each court term. Va. Code Ann. § 4852 (1936). Aside from "male citizens . . . twenty-one years of age," the only criteria guiding the judge's choice were that the persons be "of honesty, intelligence, and good demeanor, and suitable in all respects." Va. Code Ann. § 4852 (1936).

Petit jurors were chosen by a three-member jury commission (appointed each year by the circuit judge) which submitted one to three hundred names from which the clerk would draw, from a closed box before witnesses, twenty-four names for use at a term of court. Va. Code Ann. §§ 4895, 5986, 5988 and 5992 (1936). The commissioners were only bound to choose male resident citizens who were twenty-one years old; Va. Code Ann. § 5984 (1936); and "well qualified." Va. Code Ann. § 5988 (1936). In Henry County the master lists were destroyed and redrawn each year so that the 1942 list is unavailable.

At the state habeas corpus hearing, the state judge found that there were no Negroes on either the grand jury which indicted Hairston or on the petit jury which convicted him. Approximately one-fifth of Henry County was non-white. The present circuit court clerk, who was deputy clerk in 1942, testified that the jury commissioners, who were all white, used voting lists (sometimes referred to as the tax

lists), containing racial designations, and telephone directories for their source of jurors. The state judge concluded that the tax lists were extensively used in the past. In making their selections, the judge and commissioners relied on reputation information acquired from their own knowledge and from the knowledge of potential jurors' neighbors. On the testimony of the clerk, a former Commonwealth's attorney, and one of petitioner's counsel at trial, the state judge found that after 1935, Negroes were included on the jury lists. It is true that there was testimony that, after the decision in Norris v. Alabama, 294 U.S. 587 (1935), the presiding judge directed that Negroes be included on juries in Henry County, or at least that they not be excluded, and the direction was obeyed. But, it is significant that most of the witnesses could remember only a single celebrated case, tried in 1944, in which any Negroes actually served, and another witness, whose recollection was more general, rather clearly indicated that Negro representation on juries was token in character.

—III—

Since Neal v. Delaware, 103 U.S. 370 (1881), federal courts have allowed Negroes complaining of indictment or conviction by juries from which members of that race were systematically excluded to rely upon circumstantial factors tending to show discriminatory practices in order to obtain relief, rather than to require direct proof of discrimination. Cf. Norris v. Alabama, 294 U.S. 587, 593 (1935). "[S]ome particular act of discrimination by some particular officer responsible for the selection of the jury" need not be shown to constitute a prima facie case and to place the burden on the state to disprove discriminatory practices. Avery v. Georgia, 345 U.S. 559, 562 (1953).

In Witcher v. Peyton, 405 F.2d 725 (4 Cir. 1969), we relied on several factors, short of direct proof, to conclude that there had been purposeful exclusion of Negroes from the grand and petit juries. First, the judge and the jury commissioners who were white selected jurors from among the "best people" known to them. We believed this practice tended to exclude Negroes because of the limited social and commercial intercourse between the races. Second, we found that records from which the names of potential jurors were taken were maintained on a segregated basis. We felt that this presented " 'the opportunity for discrimination . . .' Whitus v. Georgia, 385 U.S. 545, 552 (1967)." 405 F.2d at 729. Finally, we found that Negroes were consistently underrepresented on both grand and petit juries. In our opinion, "[d]isproportionate representation [which] was recurrent, systematic and relatively uniform in degree," 405 F.2d at 728, provided objective evidence of discrimination. 405 F.2d at 727-729.

In the later decision of Stephens v. Cox, 449 F.2d 657 (4 Cir. 1971), we concluded that there was sufficient proof to establish a prima facie case of systematic exclusion so to require the state to show that a disproportion between the ratios of Negro population and Negro grand and petit jurors resulted from benign and non-discriminatory factors. There, what was proved was the fact of the imbalance and the opportunity for discrimination under substantially the same statutes and procedures as were followed in the selection of Hairston's juries. In *Stephens* the disparity between adult Negroes and their representation on juries was proved to be approximately 2-1. In the instant case, on the present record, the disparity is inferrably far greater. *Stephens* therefore, decided that a prima facie case has been established here and the state must establish that there was not

an actual disparity or that there are lawful circumstances to explain whatever disparity existed.

In this case, the factors present in *Witcher* are also present. Despite testimony that Negro jurors were selected as early as 1935, no one recalled seeing a Negro actually serve until 1944. The witnesses who testified in this regard were the clerk, the Commonwealth's attorney in 1942, a deputy sheriff and one of the attorneys who represented Hairston in 1942, and who had practiced law in Henry County since 1932. All of the witnesses had, thus, spent their professional lives as observers and integral parts of the Henry County court system. Their non-recollection is of great weight since the presence of Negroes on juries in the late thirties and early forties would certainly have been an event of note, given the then condition of race relations. In Norris v. Alabama, 294 U.S. at 591, it was held that the testimony of jury commissioners, court clerks, and persons who had lived their entire lives in the county in question that they "had never known of a Negro *serving*" (emphasis added) on a grand or petit jury established a prima facie case. There is little difference between the testimony in *Norris* and that of the witnesses here who could not recall that a black ever *served* on either jury, except for one case in 1944.

As in *Witcher*, there was in the instant case, an all-white jury commission and state judge who chose jurors on the basis of their subjectively evaluated reputations. The permissive statutory selection criteria of "well qualified" and "honesty, intelligence and good demeanor, and suitable in all respects" deferred judgment entirely to the selecting agent's preconceived notion of indices of these traits. "It is a simple truth of human nature that we usually find the 'best' people in our own image, including, unfortunately, our own pigmentation." 405 F.2d at 727. But

in any event, "in a society that is still largely segregated, at least socially, it is obviously true that white people do not generally have the wide acquaintance among Negroes that they have among other white people. A failure of either the judge or the commissioners fully to acquaint themselves with all those eligible for jury duty can just as effectively result in racial discrimination as would conscious and deliberate invidious selection." 405 F.2d at 727.

Finally, and most significantly, the clerk of the court testified that the tax paid list from which the initial selections were made was maintained on a segregated basis. This is a critical factor since it was a "component part" of the selection mechanism and gave "opportunities to discriminate, as experience tells us there will inevitably be when such differentiating [lists] are used." Avery v. Georgia, 345 U.S. at 564 (Frankfurter, J., concurring). Sources of names that racially identified prospective jurors were the most impermissible elements of the selection devices condemned in *Whitus*, *Avery* and *Witcher*. It is a reasonable conclusion to draw from the paucity of black jurors shown here that available opportunities for racial exclusion were utilized. The compilation of a major source of names on the basis of racial identity, thus permitting discriminatory selections at the master list stage, could render ineffectual the safeguards created by the drawing of petit jurors. See Va. Code Ann. § 5992 (1936).

Thus, applying federal constitutional standards to the facts demonstrated by the evidence in the state habeas corpus hearing, Hairston has stated a prima facie case under the rationale of *Stephens* and *Witcher*. See also, Hamilton v. Watkins, 436 F.2d 1323 (5 Cir. 1970).

The correctness of our conclusion that, on the authority of *Witcher* and *Stephens*, Hairston established a prima facie case of systematic exclusion is confirmed by the

Supreme Court's recent decision in *Alexander* v. *Louisiana*, ... U.S. ..... (No. 70-5026, April 3, 1972), rendered not only subsequent to argument of this appeal but also subsequent to the preparation of an earlier draft of this opinion. In *Alexander*, petitioner, a Negro convicted of rape, attacked the validity of his conviction, *inter alia*, on the ground of inviduous racial discrimination in the selection of the grand jury which indicted him. The evidence showed that Lafayette Parish where he was tried had a Negro population of 21%. Petitioner's grand jury venire included one Negro, and the grand jury which indicted him none. Grand jurors were selected as follows: Jury questionnaires were sent to persons on a list compiled from nonracial sources by an all-white jury commission, but the questionnaires included a space for racial designation. Approximately 14% of the questionnaires returned were from Negroes. To each returned questionnaire, the jury commissioners attached an information card showing among other data, race. The commissioners then undertook to eliminate questionnaires of those persons not qualified for jury service or exempted by state law. The approximately 2,000 remaining questionnaires were placed on a table from which 400 were selected, purportedly at random. These were placed in a box and 20 were drawn to constitute the grand jury venire.

From these facts, the Court held that petitioner had made out a prima facia case of invidious racial discrimination, thus casting upon the State the burden of explaining how, from benign, nonracial considerations, there was a disproportionately low number of Negroes throughout the selection process. The Court held that petitioner's case was proved by (a) the striking decimation of Negro jurors at the end of the selection process and (b) the

fact that the selection process was not racially neutral. These factual conclusions were arrived at notwithstanding that there was testimony, unquestioned by the Court, that race was not a consideration in the selection process. Rather, the Court thought that proof of the opportunity for discrimination and the result proved discrimination in fact.

Both operative facts relied on in *Alexander* to invalidate the conviction are found in the present record. Hairston had no Negro jurors, grand or petit, in an area where the Negro population was 20%. Even in the light most favorable to the State, the present evidence shows that Negroes had been underrepresented—if not unrepresented—on grand and petit juries for years. Additionally, the major source of potential jurors, as the state court found, was lists which carried racial designations. Thus, there is the congruence of opportunity for systematic exclusion and a result consistent with systematic exclusion. *Alexander,* thus, requires that Hairston be freed unless the State can rebut the prima facie case, or the State elects to retry him validly.

- IV -

We do not hold that Hairston is entitled to habeas corpus relief at this time. While we disagree with the legal conclusion of the state and district courts that Hairston failed to show prima facie there was systematic exclusion of Negroes from jury service at the time of his trial, the state is entitled to the opportunity to rebut or explain. Stephens v. Cox, supra. We recognize that data on the composition of jury lists in 1942 and related years is now impossible to obtain. Nonetheless, it appears that the actual panels which sat in specific cases are still known and an examination and analysis of these records may pro-

vide a fertile field for the state's defense if it elects to pursue them. Other persons who have some recollection of the composition of juries in 1942 may also still be available. In any event, petitioner's right to be afforded equal protection of the laws is a basic one. We agree with the Fifth Circuit which, in granting habeas relief in 1970 because of systematic exclusion from a conviction obtained in 1932, said "[d]elay alone is no bar to federal habeas relief to correct jurisdictional and constitutional trial errors." Hamilton v. Watkins, 436 F.2d at 1326.

REVERSED and REMANDED.

Albert V. Bryan, Circuit Judge, dissenting:

For 26 years appellant has withheld any challenge to the methods by which the juries were chosen that indicted and convicted him of murder in 1942. Nothing is adduced to show why the contentions he now makes could not have been asserted then. However, it is conclusively established that this inexplicable delay obstructs, if not defeats, the ability of the State to rebut his charges. Time, through death, disappearance of witnesses and destruction of records, serves one who would fault the proceedings in which he has been convicted.

The record indicates that complete information on the composition of jury rolls at the time of Hairston's conviction is no longer existent. He does not and cannot demonstrate the racial profile of the population eligible at that time for jury service.

Rather than reveal discrimination in the drawing of Negroes as jurors, the evidence indicates that inclusion of them was essayed. Witnesses without contradiction testified that the Judge of the State Court in which Hairston was tried had explicitly directed as early as 1935 that

Negroes be put on jury rolls, obeying the precept of Norris v. Alabama, 294 US 587 (1935). The mere circumstance that none served on the juries which indicted and convicted petitioner—a fact subject to a witness' suggestion that one of the petit jurors may have been a Negro—does not support the claim of systematic exclusion entitling petitioner to relief. Virginia v. Rives, 100 US 313 (1879). Furthermore, witnesses testified to personal knowledge that Negroes were on the juries in 1944.

Taken together, including the protracted delay of the appellant, the facts recounted herein preclude the assertion of a denial of due process in his trial and conviction.

The decision upon which the majority now rests, Alexander v. Louisiana, ... US ....., 40 L.W. 4365 (April 3, 1972), is not precedent here. There the objection to the selection of the grand jury was made before, *not 26 years after,* trial.

I would affirm the District Court's dismissal of the appellant's claim.

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 14,768

King Hairston,

Appellant,

versus

J. D. Cox, Superintendent,
Virginia State Penitentiary,

Appellee.

ORDER

Appellee's petition for rehearing, with a suggestion for rehearing in banc, having been read and considered, and no member of the original panel or any circuit judge in active service having requested a poll on the suggestion for rehearing in banc, it is, with the concurrence of the panel, ORDERED, that the petition is denied.

For the Court:
/s/ Harrison L. Winter
United States Circuit Judge

Filed, June 22, 1972
Samuel W. Phillips, Clerk